Supreme Court, U.S.
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91-1454

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VILLA MARINA YACHT SALES, INC., VILLA MARINA YACHT HARBOUR, INC., AND SAN JUAN BAY MARINA, INC.,

Petitioners,

v.

HATTERAS YACHT, HATTERAS INTERNATIONAL, DIVISIONS OF GENMAR INDUSTRIES, INC., GENMAR INDUSTRIES, INC., AND HERBERT L. POCKLINGTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a federal court can relinquish its virtually unflagging obligation to exercise jurisdiction in favor of an alternate forum which the Court of Appeals has found to be inadequate to protect plaintiff's constitutional rights to a jury, an appeal, and counsel.

(2) Whether a federal court should relinquish its virtually unflagging obligation to exercise jurisdiction in favor of (1) a declaratory judgment which was found to be filed in anticipation of litigation, and (2) when at least four factors have been found to favor the retention of jurisdiction.

(3) Whether the district court deprived plaintiff of due process by making a factual finding against plaintiff directly contrary to the affidavit

submitted by plaintiff, but which was the only evidence submitted on this issue.

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OPINIONS BELOW

The January 30, 1990 opinion of the United States District Court for the District of Puerto Rico (Gierbolini, J.) dismissing this action under the Colorado River doctrine is unreported and contained in the Appendix to this brief at A-95. The September 20, 1990 opinion of the United States Court of Appeals for the First Circuit vacating that decision and remanding the action for further consideration is reported at 915 F.2d 7 ("Villa Marina I") and is contained in the Appendix at A-55. The district court's March 27, 1991 opinion on remand dismissing the case under Colorado River is reported at 762 F. Supp. 1007 and contained in the Appendix at A-34. The First Circuit's October 22, 1991 opinion affirming the district court's order of dismissal is reported at 947 F.2d 529

("Villa Marina II") and is included in the Appendix at A-1.

JURISDICTION

On October 22, 1991, the United States Court of Appeals for the First Circuit entered judgment affirming the district court's dismissal under the Colorado River doctrine. On December 2, 1991, the First Circuit denied appellants' motion for rehearing and rehearing in banc. Jurisdiction of this Court to review the First Circuit's judgment by writ of certiorari arises under 28 U.S.C. § 1254(1).

STATUTES

The constitutional provisions involved in this petition are the fifth and seventh amendments to the United States Constitution, which respectively provide in relevant part that:

> 1. "No person shall be ... deprived of life, liberty, or

property, without due process of law . . . ."

2. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

STATEMENT OF THE CASE

Plaintiff Villa Marina Yacht Sales, Inc. ("Villa Marina")[1] had been a distributor of Hatteras Yachts since 1980 (Complaint, ¶¶ 6-7, Record ("R.") 6-7). On September 26, 1988, defendant Hatteras International ("Hatteras") terminated plaintiff's distributorship. (Complaint, ¶ 24, R. 13.)

Hatteras filed a declaratory judgment on January 9, 1989 in the Commonwealth court which the district court found was filed in anticipation of this suit by plaintiff. 762 F. Supp. at 1008, App. at A-36. Villa Marina filed a

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[1]There are no parent or subsidiary companies of any of the plaintiff corporations.

counterclaim on February 7, 1989 seeking to be reinstated as the Hatteras distributor (R. 1451) and then filed a separate suit against Hatteras's new distributor, Hatteras Yacht Sales of Puerto Rico (not a party to this action and not related to Hatteras) and Hatteras's president, Herbert Pocklington, on February 10, 1989. 762 F. Supp. at 1008, App. at A-36-37.

Villa Marina filed a motion in the Hatteras action for a preliminary injunction to attend the upcoming Miami boat show as the only authorized Hatteras distributor in Puerto Rico. (R. 1455.) The motion was denied on February 15, 1989. (R. 1457.)

In addition to distributing Hatteras Yachts, Villa Marina had also been the authorized dealer for Bertram Yachts in Puerto Rico since January 1, 1981. (Complaint, ¶¶ 53-54, R. 22.) On

April 11, 1989, Bertram terminated Villa Marina's dealership. (Complaint, ¶¶ 57-59, R. 23.) Subsequently, plaintiff learned that Pocklington and Hatteras precipitated this termination. (Complaint, ¶ 56, R. 23.) As a result, plaintiff filed this action in the district court.[2] While counts I and II related solely to the Hatteras situation, Count III related solely to the Bertram termination which did not occur until April 11, 1989, well after the Commonwealth court denied the requested injunction.

On August 8, 1989, defendant Pocklington filed a motion to dismiss contending that the federal court lacked personal jurisdiction over him. (R. 64.) Thereafter, on November 30, 1989, defendants moved to dismiss under the

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[2]Jurisdiction was invoked on diversity grounds under 28 U.S.C. § 1332.

abstention doctrine set forth in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). (R. 118.) During the pendency of these motions from August 8, 1989 to January 30, 1990 when the district court issued its opinion, 10 motions to prevent plaintiffs' discovery were filed, including "urgent" motions and appeals from unfavorable rulings of the Magistrate. (R. 64, 84, 90, 95, 99, 107, 114, 171, 229, 234.) Indeed, the district court specifically found that defendants stalled the discovery in this case. 762 F. Supp. at 1009, App. at A-42.

In its January 30, 1990 opinion, the district court granted Pocklington's motion to dismiss for lack of personal jurisdiction and granted Hatteras's motion to dismiss under the Colorado River doctrine. (R. 320, App. at A-95.) Plaintiff moved for an expedited appeal which was granted by the First Circuit.

On September 20, 1990, the First Circuit reversed the district court's decision that it did not have jurisdiction over Pocklington and vacated its judgment that the case should be dismissed under Colorado River. Villa Marina I, 915 F.2d 7, App. at A-55. The case was remanded to the district court with a request to articulate "relevant facts that do not appear in the appellate record" to justify the district court's decision to dismiss. 915 F.2d at 13, App. at A-80-81. In point of fact, there were no relevant facts that did not appear in the appellate record as the appellate record and trial court record were one in the same. No hearings or conferences had occurred in the district court.

On remand, defendants filed a motion to confirm dismissal under Colorado River. (R. 343.) Defendants filed a cross motion for an evidentiary hearing.

(R. 582.) The court set a hearing for December 4, 1990. (R. 2.) At the hearing, plaintiff proffered the testimony of plaintiff's president, Eduardo Ferrer, who would testify that this suit was motivated by the Bertram termination that occurred after the injunction hearing in the Commonwealth court and by plaintiff's desire for a forum in which it could have a jury, a right to appeal, and its English-speaking counsel. (12/4/90 Tr. at 21-22.) No counter-offer of proof was made by defendants. The court set a simultaneous briefing schedule and ordered the parties to include anything they wished in their filing. (12/4/90 Tr. at 61.)

On January 4, 1991, plaintiff filed its memorandum pursuant to the court's December 4, 1990 order. (R. 655.) Attached to its memorandum was the affidavit of Eduardo Ferrer, the president

of plaintiff. In his affidavit, Mr. Ferrer stated that he authorized the filing of the federal suit because of the Bertram termination (R. 679, ¶¶ 3-4); he wanted a jury trial (R. 679, ¶ 4); he wanted the procedural safeguard of an automatic appeal which he did not have under Puerto Rican law (R. 679, ¶ 5); and he wanted the same lawyer to handle both the company's separate suit against Bertram and the Hatteras suit. (R. 679, ¶ 4.) Both cases were filed in the federal court on the same day as the instant case by the same lawyer: Michael J. Rovell. As Mr. Rovell does not speak Spanish and Spanish is the official language of the Commonwealth court, for all practical purposes Mr. Rovell would be precluded from handling litigation in that court.

No counter-affidavit was filed. Nor was there a motion to strike or any additional evidence submitted that was not

before the district court when it dismissed the case in January 1990. In addition, the district court found that jurisdiction over the res and convenience of the forum "cut against dismissal." 762 F. Supp. at 1009, App. at A-41-42. Nevertheless, the district court found that plaintiff's suit was a reaction to the denial of the preliminary injunction back in February 1990, and again dismissed the suit. 762 F. Supp at 1010, App. at A-A-47.

The district court relied heavily upon a finding in a different action that that suit was a reaction to this suit. 762 F. Supp. at 1010, App. at A-47-48. The First Circuit did not endorse the concept of "borrowing" the subsequent judge's finding and expressly noted that it would not decide whether this procedure was proper. Villa Marina II, 947 F.2d at 533, App. at A-15.

Moreover, the borrowed finding is the subject of appeal No. 91-1657 that has been scheduled for oral argument on March 4, 1992.

On October 22, 1991, the First Circuit affirmed the dismissal because plaintiff's "arguments fall short of demonstrating an abuse of the court's discretion . . . ." Villa Marina II, 947 F.2d at 531, App. at A-2. Even more telling is the First Circuit's comment: "And, regardless of our own inclinations, we are unable to say that the court abused its discretion . . . ." 947 F.2d at 537, App. at A-33.

In discussing the factors to be considered in a Colorado River analysis, the First Circuit expressly found that the "federal court will be more advantageous for many litigants in Puerto Rico" because of the right to a jury, an appeal as a matter of right and choice of counsel.

The court thus concluded that "the district court erroneously counted the forum adequacy factor in favor of dismissal." Villa Marina II, 947 F.2d at 537, App. at A-31-32.

Moreover, while the First Circuit noted that "[t]he district court determined that the [removal] policy should have some weight and that it operated against Villa Marina's desire to litigate in federal court," it concluded that "removal policy does not operate in favor of dismissal here." Villa Marina II, 947 F.2d at 536, App. at A-26, A-29.

The district court's finding that jurisdiction over the res and convenience of the forum "cut against dismissal," 762 F. Supp. at 1009, App. at A-41-42, plus the First Circuit's determination that removal policy did not favor dismissal and that the alternate forum was inadequate to safeguard

plaintiff's rights made at least four factors found to weigh against dismissal.

ARGUMENT

I. THIS ACTION WAS IMPROPERLY DISMISSED IN FAVOR OF A FORUM THAT DOES NOT ADEQUATELY PROTECT PLAINTIFF'S CONSTITUTIONAL RIGHTS

No reported case has been found where a federal court has declined to exercise its jurisdiction when it found that the favored forum did not adequately safeguard the parties' rights. It is inconceivable that a court in one breath could extol its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]" (quoting Colorado River, 424 U.S. at 817 (1976)); proclaim that "[o]nly the clearest of justifications will warrant dismissal" (quoting Colorado River, 424 U.S. at 819); emphasize that "[t]o ensure that only exceptional cases are dismissed . . . the

district court must approach its decision 'with the balance heavily weighted in favor of the exercise of jurisdiction'" (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 US 1, 16 (1983)); promise that "the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the Commonwealth court"; pledge that "[d]ismissal is not warranted simply because . . . two courts otherwise would be deciding the same issues"; and then proceed to dismiss the case when the Commonwealth court deprived plaintiff of its right to a jury; a right to an automatic appeal; and a right to have its choice of counsel. See Villa Marina I, 915 F.2d at 12, 16; App. at A-73-74, 77.

Surely, when Congress promulgated the Judiciary Act of 1789 and established diversity jurisdiction, it did not think that the federal courts would decline to exercise the jurisdiction it gave them in favor of a forum that is conducted in a foreign language and where procedures are based upon foreign law quite separate and apart from Anglo-American jurisprudence.

While Congress has occasionally amended the Judiciary Act, it has never seen fit to exclude Puerto Rico from the ambit of diversity jurisdiction. Hence, there is no reason to believe that Congress intended to provide the citizens of Puerto Rico lesser protection and safeguards than other citizens. Nor has this Court ever intimated that its decision should apply in a "watered down" version to Puerto Rico.

The underpinnings of the fundamental rights of trial by jury and right to counsel are so well known to this Court that it would be presumptuous of plaintiff to provide a dissertation on these rights. Nor could plaintiff possibly improve on this Court's own pronouncements concerning these fundamental rights. See, e.g., Dimick v. Schiedt, 293 U.S. 474 (1935) ("[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial shall be scrutinized with the utmost care"); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (the right to counsel, while possibly not a fundamental right nor essential to a fair trial in other countries is fundamental and essential in the United States); Johnson v. Zerbst, 304

U.S. 458, 462 (1938) (the Sixth Amendment right to counsel is an essential right of a litigant and "if the constitutional safeguards it provides be lost, justice will not 'still be done.'"); Powell v. Alabama, 887 U.S. 45, 53, 69 (1932) ("the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice" in both civil and criminal proceedings). See also Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820 (1980) ("the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process").

The First Circuit has specifically held that the constitutional right to a jury applies to citizens of Puerto Rico who sue in the federal court,

notwithstanding that the same citizens do not have a right to a jury in the Commonwealth court. See Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987), cert. denied, 484 U.S. 1065 (1988).

It is anomalous for a court to recognize the right with one hand and permit the taking of the right with the other. By dismissing this action, the lower court has precluded plaintiff from exercising its constitutional rights to a jury and counsel and its fundamental federal right to an automatic appeal.

II. THE COURT OF APPEALS FAILED TO APPLY THE PRONOUNCEMENTS OF THIS COURT IN COLORADO RIVER AND ITS PROGENY

This Court took great pains to emphasize that the exception created by its decision in Colorado River was to be narrowly construed. The Court has characterized the federal court's obligation to exercise its jurisdiction as "virtually unflagging." Colorado River,

424 U.S. at 817. It has also held that the balance is "heavily weighted in favor of jurisdiction." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983).

This Court foresaw the possibility that these admonitions would go unheeded and, like here, be given lip service only to be sacrificed upon the altar of the abuse of discretion standard:

> Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standard prescribed by this Court.

Moses H. Cone Mem. Hosp., 460 U.S. at 19.

Twice the First Circuit intimated that its decision would have differed from the district court's. In Villa Marina I, the court indicated that it could have weighed the factors and decided the case itself, but chose instead to remand in case the district court knew

something the court of appeals did not. Villa Marina I, 915 F.2d at 13, App. at A-80-81 (the "district court may be privy to relevant facts that do not appear in the appellate record"). In fact, in Gonzalez v. Cruz, 926 F.2d 1, 3 (1st Cir. 1991), the First Circuit relied on its opinion in Villa Marina I and expressly stated that it concluded in Villa Marina I "that the factors considered by the district court were insufficient to warrant dismissal . . . ."

In Villa Marina II, the court indicated that the district court's opinion was contrary to the First Circuit's "own inclinations," but affirmed because it was "unable to say that the [district] court abused its discretion . . . ." 947 F.2d at 537, App. at A-33. The fact that the First Circuit in reviewing the record would presumably have reached a different conclusion supports the position

that the case should not have been dismissed.

In addition, this is the only reported case where a declaratory judgment action has been given precedence over an actual claim for damages. In the past, the fact that the action was a declaratory judgment action was used as a basis to surrender, not retain, jurisdiction. See, e.g., Fuller Co. v. Ramon I. Gil, 782 F.2d 306 (1st Cir. 1986) (court found that dismissal of the federal action was proper where it sought declaratory relief); National R.R. Passenger Corp. v. Providence & Worcester R.R. Co., 798 F.2d 8 (1st Cir. 1986) (affirming dismissal of a federal declaratory judgment action where state court had jurisdiction over res); Liberty Mutual Ins. Co. v. Foremost-McKesson, Inc., 751 F.2d 475 (1st Cir. 1985) (federal declaratory judgment action dismissed to avoid piecemeal litigation).

This is the only reported case where it has been found that the alternate forum could not safeguard the litigant's rights and the court nevertheless surrendered jurisdiction.

This is the only reported case where at least four factors have been found to "cut against" dismissal and the case is dismissed even though the balance should be heavily weighted in favor of the retention of jurisdiction which can only be surrendered in the "exceptional" case because of the unflagging obligation of the lower courts to exercise the jurisdiction that Congress has given them.

If the Colorado River doctrine is to have any vitality, this Court must reverse. The First Circuit's opinion has widened the "narrow stream" of Colorado River to the widest expanse of the Pacific Ocean. One cannot intellectually square the results below with the Court's

holdings in Colorado River and its progeny. While plaintiff believes that Colorado River and its progeny were correctly decided, plaintiff respectfully submits that it is better to overrule Colorado River than to engage in the fiction that it is being applied and permit a lower court for any reason to dismiss a case no matter how many factors "cut against dismissal" and no matter how "unexceptional" the case really is.

It is evident that the First Circuit applied a general abuse of discretion standard rather than determining whether the district court abused its discretion in view of the balance heavily weighted in favor of the retention of jurisdiction as set forth by this Court.[3] In essence, the First

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[3]Plaintiffs respectfully submit that even under a lesser standard of abuse of discretion, the First Circuit failed to follow its decision in Coon v. Grenier,

Circuit has permitted the lower court carte blanche in determining whether to retain or surrender jurisdiction as long as the lower court intones the correct words. Surely this Court's admonitions and the spirit of this Court's decisions cannot be so easily circumvented.

In this case, the lower court specifically found that defendants' suit in the alternate forum was filed in anticipation of plaintiffs' claim. 762 F. Supp. at 1008, App. at A-36. Although it found (we believe erroneously) that the

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867 F.2d 73, 78 (1st Cir. 1989), where it stated that "abuse of discretion" occurs when "a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Here the First Circuit found that two factors the lower court weighed in favor of dismissal ought to have been weighed against dismissal. Villa Marina II, 947 F.2d at 536-37, App. at A-29-30.

alternate forum was more advanced,[4] it found that defendants stalled discovery here. 762 F. Supp. at 1009, App. at A-42. In short, defendant is rewarded for its purposeful delaying tactics.

III. PLAINTIFFS' RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S FINDING WITHOUT AN EVIDENTIARY HEARING AND CONTRARY TO PLAINTIFFS' AFFIDAVIT, THAT THIS SUIT WAS REACTIVE

The court of appeals found that the district court "supportably found" that this lawsuit was reactive, a factor properly considered in determining whether to decline the exercise of jurisdiction under Colorado River. Villa Marina II, 947 F.2d at 533; App. at A-15. The district court's finding, however, is contrary to the only evidence submitted on this issue, an affidavit of Villa Marina's

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[4]At the time of the lower court's decision, the Supreme Court of Puerto Rico had stayed proceedings in the Commonwealth court. 762 F. Supp. at 1009, App. at A-43-44.

president, Eduardo Ferrer. By disregarding this affidavit, the court implicitly made a credibility determination without holding an evidentiary hearing and therefore violated Villa Marina's right to due process.

A litigant has a constitutional right to be heard and explain his conduct. Hovey v. Elliot, 167 U.S. 409, 416, 418 (1897). Moreover, a judgment supported by no evidence on an essential element violates due process. Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam). Thus, a court may not make findings contrary to unrebutted direct evidence without conducting a hearing to assess the credibility of that evidence.

Ferrer submitted an affidavit explaining that he filed this action because Hatteras's interference with the Bertram contract led to the termination of that contract and substantial damages that

were not the subject of the Commonwealth suit. (R. 679, ¶¶ 3-4.) In addition, Ferrer explained that the suit was filed in federal court because in that court, unlike the Commonwealth court, he had a right to jury, an appeal as of right, and the ability to choose English-speaking counsel. (R. 679, ¶¶ 4-5.)

These statements were unrebutted. No counter-affidavit was filed. No evidence was ever taken. Moreover, the record corroborated Ferrer's statements. The Bertram case, No. 89-0313, was filed in the United States District Court for the District of Puerto Rico on the same day as this case. Both cases demanded trial by jury, and in both cases Villa Marina was represented by the same Chicago attorney. Finally, unlike the Commonwealth action, no equitable relief was sought in this action.

The district court recognized that Ferrer's reasons showed a motivation for filing the federal suit that was neither reactive nor vexatious. 762 F. Supp. at 1010, App. at A-46-47. Nevertheless, the district court concluded that "Villa Marina came to federal court in reaction to its failure to obtain a preliminary injunction in the Superior Court." 762 F. Supp. at 1010, App. at A-47.

The district court's finding is premised solely on the fact that this suit was filed at a point in time after the Commonwealth court denied a motion for preliminary injunction. This does not constitute evidence. See Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam) (where state required to prove that defendant store operator personally sold minor an inscribed button pin, testimony that defendant "controlled the

premises" that day not probative as to whether he sold the button).

Ferrer expressly stated that the denial of the injunction had no bearing on his decision to file in federal court. By finding that the denial of the injunction was the motivation for the federal suit, the court made a credibility determination that Ferrer's statements were untrue without ever hearing him. While the court could have found for plaintiff based on his uncontested affidavit, it violated plaintiff's right to be heard by disregarding the affidavit and making a contrary factual determination. Accordingly, plaintiff's right to be heard was violated.

CONCLUSION

For the reasons set forth above, petitioners respectfully request this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioners

Dated: March 2, 1992

United States Court of Appeals
For the First Circuit

No. 91-1411

VILLA MARINA YACHT SALES, INC., ET AL.,
Plaintiffs, Appellants,
v.
HATTERAS YACHTS, ET AL.,
Defendants, Appellees.

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Gilberto Gierbolini, U.S. District Judge]

Before
Selya, Circuit Judge,
Coffin and Timbers,* Senior Circuit Judges.

Michael J. Rovell with whom Lisa I. Fair, Law Offices of Michael J. Rovell, Gerardo A. Carlos, Carlos & Troncoso, Carlos Latimer, and Ramirez, Latimer & Biaggi were on brief for appellants.

Rossell Barrios-Amy with whom McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz-Suiza were on brief for appellees.

October 22, 1991

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* Of the Second Circuit, sitting by designation.

COFFIN, Senior Circuit Judge. This appeal requires us to consider, for the second time, whether the district court properly ordered dismissal under the abstention-like doctrine established in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Approximately one year ago, we remanded this case because it was unclear whether the court had given due weight to the heavy presumption in favor of retaining jurisdiction. See Villa Marina Yacht Sales v. Hatteras Yachts, 915 F.2d 7 (1st Cir. 1990). Upon reconsideration, the district court renewed its decision to dismiss; appellants accordingly renewed their challenge to the dismissal. We conclude that appellants' arguments fall short of demonstrating an abuse of the court's discretion, and we therefore affirm.

I. Background

Although we recited the facts of this case in some detail in our prior opinion, a reprise seems necessary to provide context for our present analysis. We see no need to rearrange the particulars, however, and therefore repeat verbatim most of the factual summary that appeared in our earlier decision. See 915 F.2d at 8-9.

"This case arises out of a dealership agreement between Hatteras International, a manufacturer of luxury boats, and Villa Marina Yacht Sales, Inc.,[1] Hatteras' longtime exclusive dealer in Puerto Rico and the Caribbean. In September 1988, Hatteras notified la

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[1] Two affiliated companies, Villa Marina Yacht Harbor, Inc., and San Juan Bay Marina, Inc., also were joined as plaintiffs in this case. For the sake of convenience, we shall refer to them collectively as Villa Marina throughout this opinion.

Marina by letter that Hatteras was terminating the relationship because of concerns about Villa Marina's business ethics and sales performance.

"Through correspondence, Villa Marina strongly objected to the termination and contested the bases for the decision. Nevertheless, in November, Hatteras executed a dealership agreement with Hatteras Yacht Sales of Puerto Rico, Inc. ("Yacht Sales"), naming it Hatteras' new exclusive dealer in Puerto Rico. Yacht Sales is owned by Pedcro Rivera Fullana, who left his position as sales manager at Villa Marina to open the new distributorship.

"Three different lawsuits followed shortly after these events. On January 9, 1989, Hatteras filed the first action against Villa Marina in Puerto Rico Superior Court. The company sought a declaratory judgment that Commonwealth law

permitted termination of the Villa Marina and its agents from interfering with the sale of Hatteras products by Yacht Sales. On February 7, Villa Marina answered and counterclaimed for damages under the Puerto Rico Dealer's Act, known as Law 75, P.R. Laws Ann. tit. 10, § 278 (1978), which prohibits a manufacturer from terminating a dealer's contract in the absence of 'just cause.'

"Three days later, Villa Marina and its president, Eduardo Ferrer Bolivar, filed a separate action in the local court against Yacht Sales, Yacht Sales' president (Rivera), and the president of Hatteras International, Herbert Pocklington, alleging tortious interference with the dealership agreement between Hatteras and Villa Marina, and damage to reputation. On May 19, however, Villa Marina moved for dismissal without prejudice of the claims against

Pocklington, apparently in preparation for the third lawsuit, which it filed a few days later in federal court against Pocklington, Hatteras Yacht, Hatteras International and Hatteras' parent corporation, Genmar Industries, Inc.[2] This suit alleges violations of Law 75, breach of contract, tortious interference with prospective business advantage and tortious interference with contracts."

Defendants moved to dismiss or stay the federal case under the Colorado River doctrine in light of the "substantially similar []" action pending in the Commonwealth court. As noted above, the district court twice has dismissed the complaint based on that

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[2] Hatteras Yacht and Hatteras International are both unincorporated divisions of Genmar Industries. Villa Marina's contract was with Hatteras International, and references to "Hatteras" throughout this opinion generally refer to that company.

doctrine. In this appeal, Villa Marina for the second time contends that the court misapplied the law in reaching its result.[3]

II. The Colorado River Doctrine

The Supreme Court in Colorado River established a narrow basis for the stay or dismissal of federal lawsuits in deference to parallel state proceedings. The Court held that, in certain "exceptional" circumstances, 424 U.S. at 818, a federal court could decline jurisdiction based on "'considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,"'" Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460

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[3] In our prior opinion, we also addressed the district court's dismissal of defendant Pocklington for lack of personal jurisdiction. See 915 F.2d at 9-11. That issue is not part of this appeal.

U.S. 1, 14-15 (1983) (quoting Colorado River, 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip Co., 342 U.S. 180, 183 (1952))).

The Court in Colorado River set out four illustrative factors to be considered in determining whether "exceptional circumstances" exist: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation, and (4) the order in which the forums obtained jurisdiction. In Moses H. Cone, the Court added two additional elements: (5) whether state or federal law controls, and (6) the adequacy of the state forum to protect the parties' rights. Another factor considered by some courts is the vexatious or reactive nature of the federal lawsuit, see, e.g., Interstate Material Corp. v. City of

Chicago, 847 F.2d 1285, 1288 (7th Cir. 1988) (listing 10 factors). See also Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 309-310 (1st Cir. 1986) (affirming district court dismissal and expressing displeasure at practice of filing federal action in reaction to adverse ruling in state court); Medema v. Medema Builders, Inc., 854 F.2d 210, 213 (7th Cir. 1988) (Colorado River doctrine necessary "to ensure judicial economy and deter abusive 'reactive' litigation").

In creating the Colorado River doctrine, the Supreme Court also was careful to limit it. The Court acknowledged the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," 424 U.S. at 817, and cautioned that "[o]nly the clearest of justifications will warrant dismissal, "id. at 819. To ensure that dismissals occur only in exceptional

circumstances, the district court must weight the relevant factors "with the balance heavily weighted in favor of the exercise of jurisdiction." Moses H. Cone, 460 U.S. at 16.

The decision whether to surrender jurisdiction is "necessarily left to the discretion of the district court in the first instance," Moses H. Cone, 460 U.S. at 19, and the district court's decision may be reversed only for an abuse of that discretion. Such discretion must be exercised, however, within the constraints of the exceptional circumstances test, id.

III. Application of the Doctrine

We remanded this case a year ago because the district court's original analysis indicated that it had neglected to give due weight to the presumption in favor of retaining jurisdiction. See Villa Marina, 915 F.2d at 13. On remand,

the district court held a non-evidentiary hearing in which both sides articulated their views regarding the balance of factors, and the parties subsequently submitted lengthy memoranda in support of their positions. In deciding again that dismissal was appropriate under Colorado River, the district court wrote a thorough opinion discussing its view of each of the relevant factors. The court therefore fulfilled the obligation set out in Colorado River to make a "carefully considered judgment[,] taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise," 424 U.S. at 818-19.

The court summarized its conclusions as follows:

> While under Colorado River's "exceptional circumstances" test a strong presumption in favor of the exercise of jurisdiction exists,

we find that the following exceptional circumstances warrant dismissal in deference to the concurrent Superior Court proceeding. First, the vexatious and reactive nature of this federal litigation is shown by the fact that Villa Marina filed the federal suit only after the Commonwealth Court rejected its application for a preliminary injunction and the fact that two weeks after we had dismissed this case, plaintiff's president, Ferrer, brought essentially the same claim in a second federal action.[4] See Moses H. Cone Hospital, 460 U.S. at 17-18 n. 20. Second, whether a claim under Article 1802 for tortious interference with prospective business advantage exists is a sufficiently novel question of law to qualify as a "rare circumstance" weighing against the exercise of jurisdiction. Moses H. Cone Hospital, 460 U.S. at 25-26. Third, the continuance of this suit would have the effect of defeating the removal policy of 28 U.S.C. § 1441. Fourth, the Commonwealth action, although instituted shortly after the federal suit is far more advance since it has involved more substantial proceedings, including hearings and two

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[4] This second federal suit, which was dismissed is the subject of a separate appeal.

interlocutory orders granting or denying temporary relief.

Villa Marina challenges the district court's determination that these factors render this a sufficiently exceptional case to warrant dismissal, and also argues that the court failed to give due weight to other factors that support retention of jurisdiction. We have given these contentions careful consideration, but conclude that the district court's decision to dismiss under Colorado River was within its discretion. We explain our conclusion by examining the relevant factors.

At the outset, however, we note that there has been no serious dispute that the federal and Commonwealth actions are sufficiently parallel to trigger the Colorado River doctrine. Villa Marina states in its brief that not all of the federal issues are included within the

Commonwealth action, but perfect identity of issues is not a prerequisite for dismissal. See LaDuke v. Burlington Northern R.R. Co., 879 F.2d 1556, 1559 (7th Cir. 1989); Arkwright-Boston Mfg. Mutual Ins. Co. v. City of New York, 762 F.2d 205, 212 (2d Cir. 1985).

We turn to our analysis of the factors relied upon by the district court in declining jurisdiction, and begin by noting that two listed by the Supreme Court in Colorado River -- jurisdiction over a res and convenience -- have no impact in this case. See Opinion at 5. The remaining factors, which require more attention, are addressed in the order of priority apparently given to them by the district court.

Motivation. Villa Marina argues that the district court had no basis for finding this lawsuit to be either vexatious or reactive. It claims that the

district court found vexatiousness based solely on the conclusion reached by another district judge in the other federal case that that action was vexatious. It is true that the court discussed only the subsequent federal lawsuit in explaining its finding of vexatiousness. It may be, however, that the court concentrated on that case because it believed it to be the most egregious example of Villa Marina's repetitive lawsuits. But even if the court improperly "borrowed" the finding of vexatiousness -- a point we do not decide -- its error would be of little effect in the balance of factors because, as we discuss below, the court supportably found this lawsuit to be reactive.

Villa Marina claims that the district court improperly disregarded an affidavit by its president, Ferrer, which explains his motivation for filing the

present action in federal court and rebuts any notion that the suit was reactive. In the affidavit, Ferrer states that he brought the second lawsuit after another company, Bertram Yacht, also terminated his distributor agreement, allegedly as a result of interference by Hatteras. He decided to file the new claims in federal court, he explained, because of the unavailability of jury trial in the Commonwealth system, the ability to choose counsel who does not speak Spanish and the ability to appeal as of right. Appellant contends that the district court had to credit Ferrer's statements because the affidavit was unopposed and no contrary evidence was heard by the court. Because the court was required to accept the affidavit as true, it was precluded from characterizing the federal complaint as reactive.

We disagree that the court was so limited in its power. We subscribe to what Professor Moore has termed "the general view" with respect to factual issues arising in connection with "a jurisdictional or related type of motion," J. Moore & J. Wicker, 6 Moore's Federal Practice ¶ 56.03 at 56-59-56-60 (1990), namely that "the court has a broad discretion as to the method to be used in resolving the factual dispute," id. In addition, we have held that a party opposing a jurisdictional challenge is given an appropriate opportunity to present facts in support of its position when such facts are presented by affidavit, deposition or in an evidentiary hearing. See Berrios v. Department of Army, 884 F.2d 28, 33 (1st Cir. 1989). Thus, the district court properly heard Villa Marina's cause by means of Ferrer's affidavit, and we may reverse its finding

that the lawsuit was reactive only if it clearly erred. See 2A J. Moore & J. Lucas, 2A Moore's Federal Practice ¶ 12.07[2.-1] at 12-49 (1990).

We find no clear no clear error. The district court was entitled to find the facts based on Villa Marina's actions rather than on Ferrer's statements. Villa Marina initially chose the Commonwealth forum in which to file claims arising out of its relationship with Hatteras, showing no concern for the lack of jury trial, right to appeal or limitation of qualified counsel.[5] In light of that earlier choice, the district court was not clearly wrong to conclude that the decision to switch to federal court stemmed from Villa

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[5] We recognize that the claims against Yacht Sales and its president, Rivera, could not have been filed in federal court because of lack of diversity. Federal jurisdiction was an option, however, for Pocklington, who was an original defendant in the Commonwealth suit.

Marina's unsuccessful effort to obtain a preliminary injunction in the Commonwealth court. The district court therefore legitimately counted the motivation factor against retaining jurisdiction.

Novel question of state law. The district court ruled that Villa Marina's claim for tortious interference with prospective business advantage presented sufficiently novel issues of Commonwealth law to qualify as a "rare circumstance[]," Moses H. Cone, 460 U.S. at 26, favoring dismissal. As we noted in our prior opinion, "[c]ourts generally have agreed that rare circumstances exist only when a case presents 'complex questions of state law that would best be resolved by a state court,'" Villa Marina, 915 F.2d at 15 (citing cases). Villa Marina asserts that the tortious interference claim at issue here is routine because the tort of interference

is widely recognized and included in the Restatement of Torts. See Restatement (Second) of Torts § 766B.

We conclude that the district court justifiably considered this factor to weigh in favor of dismissal. Puerto Rico court do not necessarily follow the "Anglo American approach" to the law, Dolphin International of Puerto Rico, Inc. v. Ryder Truck Lines Inc., 91 J.T.S. 13 (Jan. 31, 1991) (Certified Translation in Appellee's Brief, App. 24, 32), and it is far from certain that Puerto Rico would adopt a non-contractual interference claim in these factual circumstances simply because a majority of state courts would do so. Several years ago, on the related question of whether the Commonwealth recognizes a cause of action for tortious interference with contract, the district court deemed it prudent to certify the issues to the Puerto Rico Supreme Court.

See General Office Product v. A.M. Capen's Sons, Inc., 780 F.2d 1077, 1079 (1st Cir. 1986). We cannot fault the district court's finding that this is a similarly substantial question of Commonwealth law, and that resolution in the Commonwealth's court is preferable. Cf. Giardian v. Fontana, 733 F.2d 1047, 1051 (2d Cir. 1984) ("garden variety" federal diversity case applying well-settled state law principles).[6]

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[6] In Dolphin International of Puerto Rico, Inc. v. Ryder Truck Lines, Inc., 91 J.T.S. 13 (1991), the Puerto Rico Supreme Court suggested that Commonwealth law would not recognize a tortious interference claim without an underlying contractual obligation:

> In our jurisdiction we have established that, as an indispensable requirement to initiate an action for culpable interference, there must exist a contract with which a third party interferes. The action cannot prosper when what is affected is a mere expectancy or a beneficial economic relationship.

Certified Translation, Appellee's Brief, App. 24, 32-22.

Order of Jurisdiction/Relative Progress. The district court also weighed in favor of dismissal its determination that the Commonwealth action had progressed substantially further than the federal case. See Opinion at 6. The court noted that, in addition to the injunction hearing, a pretrial report had been filed in the Commonwealth action and ten depositions have been completed. In the federal action, in contrast, Hatteras has yet to answer the complaint and little discovery has taken place.

Villa Marina has not argued that Dolphin International settles the viability of its non-contractual tortious interference claim, making it unnecessary for the issue to be hear in Commonwealth court. Nor has Villa Marina argued that the state law factor should not weight toward dismissal because the Commonwealth action lacks an explicitly named "tortious interference" count. See Appellee's Brief at 28 (suggesting that tortious interference claim made in federal lawsuit is equivalent to Commonwealth suit's commercial defamation claim).

Villa Marina argues that whatever progress has occurred in the Commonwealth action has not advanced that litigation relative to the federal lawsuit because any evidence developed thus far could be used in either case. In addition, Villa Marine argues that certain issues are more developed at the federal level than in the Commonwealth court. It cites, for example, the question of personal jurisdiction over Hatteras' president, Pocklington, which this court resolved in the prior appeal. Moreover, Villa Marina argues that it would be unfair to consider progress made in the Commonwealth action during the time the federal case was held in abeyance following the district court's original dismissal.

Even granting Villa Marina some leeway because of the eight months of stalled action, we believe the district

court properly considered this factor in favor of dismissal. The preliminary injunction hearing, which produced multiple volumes of transcript, covered the merits of the Law 75 claim, and thus represented significant development of the case. Although we do not doubt that the transcript could be admitted as evidence in the federal case, it would negate entirely the relevance of the progress factor if we discounted what occurred in the state forum merely because it could be transferred to the federal one. In short, transferability of transcripts cannot automatically trump relative progress. Although some aspects of the case may be more developed in the federal action, the bottom line is that the Commonwealth case overall is markedly more advanced.

Piecemeal litigation. In our prior opinion, we observed that a federal lawsuit should not be dismissed in

deference to state litigation simply because two courts would be deciding related -- or even the same -- issues. Instead, "the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the Commonwealth court." 915 F.2d at 16. The district court on remand explicitly referred to our cautionary language on this factor, but nevertheless determined that the factor favored dismissal because of the manner in which the parties have behaved. According to the district court, "both parties have attempted to stall the proceedings in the forum that they found most likely to rule in its favor," Opinion at 5. The court therefore concluded that this case involved more than "routine inefficiency," and that litigation in a

single forum was necessary. We consider this a legitimate judgment, both factually and legally.

Removal policy. We discussed at some length in our prior decision the possible impact of removal policy on a court's Colorado River decision. See 915 F.2d at 14. The district court determined that the policy should have some weight, and that it operated against Villa Marina's desire to litigate in federal court.

To allow Marina to proceed here is tantamount to removal because it would have the effect of allowing a plaintiff, who initiates an action in state court [], to remove it to federal court when he feels that events in the state court have taken an unfavorable turn. In cases like this one, a plaintiff should not be allowed to circumvent the policy of [28 U.S.C.] Section 1441 which "reflect[s] a

Congressional intent that a plaintiff should not be permitted to alter the forum that it selects to litigate its claim against a particular defendant." [American Int'l Underwriters v. Continental Ins. Co., 843 F.2d 1253, 1261 (9th Cir. 1988).]

Opinion at 7.

Villa Marina argues that removal policy should be given no weight because a plaintiff is entitled to file a lawsuit in state court, dismiss it and then refile the same action in federal court. In such a case, Villa Marina asserts, the defendant is not permitted to seek remand to the state court even if the plaintiff concedes that the only reason for the dismissal and refiling was to obtain a more favorable forum.

Villa Marina's point with respect to forum selection, generally, is well taken. The problem with its argument

in the context of this particular litigation, however, is that plaintiffs who dismiss their state lawsuits have eliminated much of the duplication and consequent waste of judicial resources that federal court abstention under the Colorado River doctrine is designed to prevent.

A more cogent point, made in Villa Marina's reply brief, is that its two lawsuits are not identical. Indeed, as we noted in our prior opinion, 915 F.2d at 14, Villa Marina's federal claims do not duplicate the claims that it filed in the Commonwealth court, and the defendants in each suit also are different. Villa Marina arguably dismissed Pocklington from the Commonwealth lawsuit precisely to avoid unnecessary duplication. Moreover, Villa Marina does not have the option of litigating its entire case in the federal court because the remaining Commonwealth

defendants share its citizenship and would negate the diversity basis for jurisdiction.

In effect, then, Villa Marina's forum-shopping in its litigation against Pocklington is permissible because, before filing the federal lawsuit, it dismissed him from the Commonwealth case. To the extent Villa Marina's forum-shopping was motivated by reasons we would not wish to condone -- such as reaction to an adverse ruling -- it is more appropriately counted in the balance as related to the "motivation" factor than to removal policy. We conclude, therefore, that whatever its relevance in other cases, removal policy does not operate in favor of dismissal here.

Adequacy of the State Forum. The district court held that this factor supported dismissal because the parties and issues in the federal lawsuit could be

joined to the Commonwealth case. In our view, the fact that the claims brought in the federal lawsuit also could be brought in state court does not promote dismissal, but is significant only as an indication that dismissal -- if affirmatively warranted based on other factors -- would not prejudice the federal court plaintiff. See Moses H. Cone, 460 U.S. at 26-27 (discussing inadequacy of the state-court proceeding to protect the plaintiff's rights); Burns v. Watler, 931 F.2d 140, 147 (1st Cir. 1991) (adequacy factor "'operates against the surrender of jurisdiction only when the state forum may not be adequate to adjudicate the claims'" (quoting Rojas-Hernandez v. Puerto Rico Elec. Power Auth., 915 F.2d 492, 496 (1st Cir. 1991))). We therefore disagree with the district court's use of this factor.

Indeed, in our view, Villa Marina makes a viable argument that the

adequacy factor weights against dismissal. As noted above, see supra at p. 9, Villa Marina's president, Ferrer, stated in an affidavit that the company filed the federal action to obtain a jury trial, the absolute right to appeal and the counsel of its choice. Although the district court was free to discredit Ferrer's statement of his primary motivation, the availability in federal court of this trio of significant options does mean, on an objective level, that federal court will be more advantageous for many litigants in Puerto Rico. The impact of these options could not, of course, be dispositive if the Colorado River doctrine is to operate in the Commonwealth. Generally, however, their availability would weight toward retention of federal jurisdiction, and we see no reason why it should not do so in the circumstances of this case. We therefore conclude that the district court

erroneously counted the forum adequacy factor in favor of dismissal.

Our review of the various Colorado River factors demonstrates that the district court had substantial bases for its decision to dismiss. Although two of the factors on which it relied -- removal policy and adequacy of the forum -- support retention of jurisdiction rather than dismissal, these were not of primary importance in the decision. The Supreme Court has instructed that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case . . ." Moses H. Cone, 460 U.S. at 16. We think it beyond dispute that the district court would have made the same judgment based solely on the remaining factors -- motivation, novel local law,

relative progress of the cases and piecemeal adjudication. And, regardless of our own inclinations, we are unable to say that the court abused its discretion in holding that the factors here, in combination, constitute "exceptional circumstances" outweighing the heavy presumption in favor of jurisdiction. Accordingly, we affirm its conclusion that "the realities of the case at hand," Moses H. Cone, 460 U.S. at 21, favor deference to the Commonwealth action.[7]

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[7] It is worth noting that the decision to dismiss this diversity case does not conflict with the important goal of diversity jurisdiction to protect out-of-state parties from bias in state fora, see Gonzalez v. Cruz, 926 F.2d 1,5 n.5 (1st Cir. 1991). It is the Puerto Rico resident, Villa Marina, which seeks to litigate in federal court, while the non-resident Hatteras wishes to litigate the entire case in Commonwealth court. In Gonzalez, we observed that the Ninth Circuit, in applying the Colorado River doctrine, "has found it significant that '[t]he ordinary justification for having jurisdiction over diverse citizens is not present...,'" id. (quoting Microsoftware Computer Systems v. Ontel Corp., 686 F.2d

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VILLA MARINA YACHT SALES, INC. VILLA MARINA YACHT HARBOR, INC. and SAN JUAN BAY MARINA, INC. Plaintiffs v. HATTERAS YACHTS, HATTERAS INTERNATIONAL, Division of Genmar Industries, Inc., GENMAR INDUSTRIES, INC. and HERBERT L. POCKLINGTON Defendants	CIVIL NO. 89-0709 GG

OPINION AND ORDER

Before the court is defendants' motion to dismiss or stay this suit in reference to a parallel proceeding in the Commonwealth court. In Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the Supreme Court held that in exceptional circumstances a federal court may decline

exercise of its jurisdiction in favor of a parallel state proceeding.

I. BACKGROUND

In September 1988, Hatteras International ("Hatteras") notified Villa Marina Yacht Sales, Inc. ("Villa Marina"),[8] its exclusive representative in the Virgin Islands and Puerto Rico, that it was terminating their distributorship agreement because of concerns regarding Villa Marina's business practices.[9] In November 1988, Hatteras executed a dealership agreement with Hatteras Yacht Sales of Puerto Rico ("Yacht Sales").

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[8] Hatteras International is a division of Genmar Industries. Herbert L. Pocklington is the president of Hatteras International. Hatteras Yachts is the former name of the contracting party with Villa Marina. Eduardo Ferrer is the president and sole stockholder of plaintiffs Villa Marina Yachts Sales, Inc., Villa Marina Yacht Harbour, Inc., and San Juan Bay Marina, Inc.

[9] In particular, Hatteras refers to the alleged fraudulent endorsement by Villa Marina of a check written by Arturo Barreiro for a 65' Hatteras vessel.

Yacht Sales is owned by Pedro Rivera Fullana, the former sales manager of Villa Marina.

In anticipation of litigation, Hatteras filed an action on January 9, 1989 in the Superior Court, San Juan Part, seeking a declaratory judgment that the termination of its distributorship agreement with Villa Marina did not violate Commonwealth law and injunctive relief to prevent Villa Marina from interfering with the sales of Hatteras' products by its new distributor, Yacht Sales. On February 7, Villa Marina answered and counterclaimed for damages under the Puerto Rico Dealer's Act, 10 L.P.R.A. § 278 et seq., and Article 1802 of the Civil Code of Puerto Rico, 31 L.P.R.A. § 5141.

On February 10, Villa Marina and its president, Eduardo Ferrer ("Ferrer") brought a separate action in the Superior

Court against Yacht Sales, Rivera Fullana and his wife, and Herbert Pocklington, Hatteras International's president, alleging violations of Law 75 and Article 1802. This separate action was consolidated with the original suit brought by Hatteras. On May 19, however, Villa Marina moved to dismiss without prejudice the claims against Pocklington. A few days later, on May 22, Villa Marina filed the complaint in this diversity action against Hatteras Yacht, Hatteras International and its president, Herbert Pocklington, and Hatteras' parent corporation, Genmar Industries, Inc., alleging violations of Law 75, breach of contract and various tortious interference claims under Article 1802.[10]

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[10] The Complaint can be summarized as follows: Counts I and II allege that Hatteras violated Law 75 and breached the agreement with Villa Marina. Count III alleges that Pocklington induced Hatteras to breach its contract and that Hatteras

On February 14, 1990, we entered judgment dismissing (1) the case against defendant Pocklington on the ground that we lacked personal jurisdiction over him and (2) against the remaining defendants under the Colorado River doctrine. On appeal, the First Circuit reversed our dismissal of Pocklington for lack of personal jurisdiction and vacated our dismissal under Colorado River. Villa Marina Yacht Sales, Inc. v. Hatteras Yachts, 915 F.2d 7 (1st Cir.1990). The Circuit court emphasized that we had failed to apply the proper standard under Colorado River and therefore it remanded the case to this court for

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and Pocklington induced another manufacturer of yachts, Bertram Yacht ("Bertram"), to breach dealership contract with Villa Marina. Count IV alleges that the actions of Hatteras and Pocklington were wrongful and have resulted in the loss of prospective business advantages to Villa Marina.

reconsideration. The First Circuit stated:

> Although we could ourselves now weigh the factors considered by the district court, [citations omitted], we prefer instead to give the district court the opportunity to conduct the proper balancing in the first instance. This appears to be a close case, and the district court may be privy to relevant facts that do not appear in the appellate record because that court previously saw no need to relate them.

II. ANALYSIS

A. Application of the Colorado River Doctrine

In Colorado River, the Supreme COurt held that a federal court may surrender its jurisdiction in deference to a parallel state proceedings only in exceptional circumstances. The Colorado River principles are based on "considerations of '[wise] judicial administration, giving regard to conservation of judicial resources and

comprehensive disposition of litigation.'" 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)). Federal courts have an "unflagging obligations" to exercise the jurisdiction conferred upon them and "[o]nly the clearest of justifications will warrant dismissal." 424 U.S. at 817-19.

In Colorado River, the Court set forth a list of four factors to be weighed in determining whether "exceptional circumstances" exist: (1) whether the state or the federal court had assumed jurisdiction over the res; (2) the hardship of litigating in the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the respective forums obtained jurisdiction. In Moses H. Memorial Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983), the Court added two

additional factors to the Colorado River doctrine: (1) whether federal law governs and (2) the adequacy of the state court's proceeding to protect the moving parties' rights. The Court emphasized that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case..." 460 U.S. at 16.

The first two factors of Colorado River are not important here. There is no property to assert in rem jurisdiction in this case and the federal court is no more inconvenient than the Superior Court since both courts are in San Juan and its vicinities. Nevertheless, since the Colorado River test requires that the balance be "heavily weighted" in favor of the exercise of

jurisdiction, these two factors cut against dismissal.

The third factor, the desirability of avoiding piecemeal litigation, counsels in favor of dismissal. However, the First Circuit analysis in Villa Marina discounted the importance of this factor in the instant case. Compare La Duke v. Burlington Northern R.Co., 879 F. 2d 1556, 1560 (7th Cir. 1989). We note, however, that although the potential for conflicting adjudication is not great here, the record reveals a related problem if we exercised jurisdiction over Villa Marina's federal action; both parties have attempted to stall the proceedings in the forum that they found most likely to rule in its favor. See La Duke, 879 F.2d at 1560.

Another factor which weighs in favor of dismissal is the order in which the courts obtained jurisdiction. The

substantial development of the Superior Court action contrasts with the absence of any material progress in this case. A hearing on an injunction to prevent plaintiff Villa Marina from representing defendant Hatteras at the Miami boat show was held on February 10, 13, and 14, 1989. It produced a transcript of three volumes, including the testimony of Ferrer, Pocklington, Rivera Fullana and Barreiro. As defendants point out, under Rule 57.1(b) of Puerto Rico's Rules of Civil Procedure, the evidence admitted by the Superior Court during this hearing is part of the record for trial. A pretrial report has been filed and ten (10) depositions have been completed. A trial on the merits was scheduled for February 4. Although the Puerto Rico Supreme Court recently stayed the proceedings, it did so, only while Hatteras showed cause as to why discovery in the Superior Court action

should not be extended for sixty additional days. In the instant case, Hatteras has not answered the complaint and discovery has been limited to the service of interrogatories and certain requests for production of documents. Three depositions have been commenced, but only one is complete.

A related consideration favoring dismissal is the removal policy under 28 U.S.C. § 1441. See American Int'l Underwriters v. Continental Ins. Co., 843 F.2d 1253, 1260-61 (9th Cir. 1988). Villa Marina first brought this suit in the Superior Court and when it was denied injunctive relief, it moved for voluntary dismissal of the claims against Pocklington to initiate this federal action. Under Section 1441, the right to remove a state court case to federal court

is limited to defendants.[11] We find that the removal policy is entitled to some weight in the Colorado River context. To allow Villa Marina to proceed here is tantamount to removal because it would have the effect of allowing a plaintiff, who initiates an action in state court action, to remove it to federal court when he feels that events in the state court have taken an unfavorable turn. In cases like this one, a plaintiff should not be allowed to circumvent the policy of Section 1441 which "reflect[s] a Congressional intent that a plaintiff should not be permitted to alter the forum that it selects to litigate its claim

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[11] Section 1441 states: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States...." 28 U.S.C. § 1441(a).

against a particular defendant." 843 F.2d at 1261. This is exactly what Villa Marina is trying to accomplish by bringing this suit.

A more critical consideration weighing against the retention of jurisdiction is Villa Marina's motivation in filing this suit. The First Circuit has emphasized that the significance of the order in which the forums obtained jurisdiction "must be examined in light of the motivation of the plaintiff in filing the second suit." Gonzalez v. Cruz, No. 90-1812, slip op. at 8 (1st Cir. Feb 1, 1991). Villa Marina alleges that it brought suit here because of the availability of jury trial; the termination of the Bertram Yacht distributorship agreement; the right to choose counsel to handle both the Hatteras case and the Bertram case; and the right to appeal as a matter of right. In short,

Villa Marina urges us to find that its motivation in bringing this action was not reactive or vexatious.

A careful evaluation of the evidence in the record, however, indicates just the opposite, that is, Villa Marina came to federal court in reaction to its failure to obtain a preliminary injunction in the Superior Court. The instant action was filed only after the Superior Court decided Villa Marina's request to remain as a Hatteras dealer during the litigation. And the record further shows that this suit is vexatious. Two weeks after we entered judgment dismissing this action under Colorado River, the Eduardo Ferrer, president of Villa Marina, brought a second suit in federal court against the president of Hatteras, Pocklington, alleging substantially the same claims as those filed by Villa Marina before this court. The court in the second federal

action found that plaintiff Ferrer was not the real party in interest and thus dismissed the action. The court noted that Ferrer's suit represented the fourth action filed by Villa Marina for essentially the same claims and, therefore, it stated:

> Ferrer cannot disregard the existence of Villa Marina when it is expedient to do so in order to circumvent a previous dismissal of this Court under Colorado River. This amounts to nothing less than forum shopping and oversteps the bounds of reasonableness to the point of vexation. Moreover, these claims had been previously filed by Villa Marina and dismissed by this Court [under Colorado River],and the judgment was pending appeal at the time the instant action was filed.

Ferrer v. Pocklington, No. 90-1311, op. at 7-8 (D.P.R. Jan. 28, 1991) (footnote omitted). Since Ferrer's suit was filed for an improper purpose, the court imposed sanctions in the amount of $5,000.00 under 28 U.S.C. § 1927 and Rule 11 of the

Federal Rules of Civil Procedure against Ferrer and his attorneys.[12]

Furthermore, the fact that state law governs is significant here. Moses H. Cone, 460 U.S. at 25-26 (presence of federal law issues is a major factor weighing against the surrender of federal jurisdiction). Villa Marina's claims are rooted in violations of Law 75 and Article 1802. Although the issues arising under Law 75 appear to be "garden variety," the issues of law under Article 1802 of the Civil Code involve a fairly novel issue, namely, whether a claim exist under Article 1802 for tortious interference with prospective business advantage. See Complaint, Count IV, at 22-23. Indeed, this court referred by certification to the Supreme Court of Puerto Rico a similar question: whether a claim exist under

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[12] Ferrer and his attorneys have filed a motion to vacate this decision.

Article 1802 for tortious interference with a contractual relation. See General Office Products Corp. v. A.M. Capen's Sons, Inc., 780 F. 2d 1077, 1079 (1st Cir. 1986). Although it is settled that "the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action, " Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 27 (1959), we find that the specific issue raised by plaintiff's theory is sufficiently novel to qualify as a "rare circumstance", which favors dismissal. 460 U.S. at 26.

The final factor weighing in favor of dismissal is the adequacy of the Commonwealth courts to protect the parties rights. San Juan Bay Marina and Pocklington, the only parties not before the Superior Court, could be joined under Rule 17 of Puerto Rico's Rules of Civil Procedure ("PRRCP"). The issues relating

to Hatteras and Pocklington alleged tortious interference with Bertram's contract are linked to the suit before the Superior Court and as such could be joined under Rule 14 of PRRCP. Indeed, Villa Marine does not deny the linkage between the Hatteras claims and the Bertram claim. (See DKT.# 72, Plaintiff's Response to Hatteras' Brief Requesting Dismissal Under Colorado River, at 11).

Colorado River's underlying principles -- which "rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'", 424 U.S. at 817 (quotation omitted) -- are present here; both actions derive from the same business transaction, involve substantially the same parties and substantially the same causes of action. As to Villa Marina's contention that the

Superior Court and this action are different, we note that the Colorado RIver doctrine requires parallel suits, not identical suits.[13] See, e.g., Interstate Material Corp. v. City of Chicago, 847 F. 2d 1285, 1288 (7th Cir. 1988) ("The addition of the federal defendants in the federal suit by itself does not destroy the parallel nature of the cases.").

III. CONCLUSION

While under Colorado River's "exceptional circumstances" test a strong presumption in favor of the exercise of jurisdiction exists, we find that the following exceptional circumstances

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[13] A parallel suit has been defined as the simultaneous prosecution of two or more suits where "at least some of the issues and parties are so closely related that the judgment of one will have res judicata effect on the other." Comment, Federal Court Stays and Dismissals in Deference to Parallel State Court proceedings: The Impact of Colorado River, 44 U. Chi. L. Rev. 641, 641 n.1 (1977).

warrant dismissal in deference to the concurrent Superior Court proceeding. First, the vexatious and reactive nature of this federal litigation is shown by the fact that Villa Marina filed the federal suit only after the Commonwealth Court rejected its application for a preliminary injunction and the fact that two weeks after we had dismissed this case, plaintiff's president, Ferrer, brought essentially the same claim in a second federal action. See Moses H. Cone Hospital, 460 U.S. at 17-18 n.20. Second, whether a claim under Article 1802 for tortious interference with prospective business advantage exists is a sufficiently novel question of law to qualify as a "rare circumstance" weighing against the exercise of jurisdiction. Moses H. Cone Hospital, 460 U.S. at 25-26. Third, the continuance of this suit would have the effect of defeating the removal

policy of 28 U.S.C. § 1441. Fourth, the Commonwealth action, although instituted shortly after the federal suit is far more advanced since it has involved more substantial proceedings, including hearings and two interlocutory orders granting or denying temporary relief. Telecto v. Telesco Fuel and Masons' Materials, Inc., 765 F.2d 356, 359-60 (2nd Cir. 1985).

For the foregoing reasons, we find "exceptional circumstances" present in this case that overcome the heavy presumption in favor of federal jurisdiction. The complaint is hereby DISMISSED.

SO ORDERED.

San Juan, Puerto Rico, this 27th day of March, 1991.

GILBERTO GIERBOLINI
U.S. District Judge

United States Court of Appeals
For the First Circuit

No. 90-1206

VILLA MARINA YACHT SALES, INC., ET AL.,
Plaintiffs, Appellants,
v.
HATTERAS YACHTS, ET AL.,
Defendants, Appellees.

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Gilberto Gierbolini, U.S. District Judge]

Before
Breyer, Chief Judge,
Campbell, Circuit Judge, and
Coffin, Senior Circuit Judge.

Michael J. Rovell with whom J. Cunyon Gordon, Jenner & Block, Gerardo A. Carlos, Carlos & Troncoso, Carlos Latimer, and Ramirez, Latimer & Biaggi were on brief for appellants.

Rossell Barrios-Amy with whom Samuel T. Cespides, Ana Matilde Nin, McConnell Valdes Kelley Sifre Griggs & Ruiz-Suria were on brief for appellees.

September 20, 1990

COFFIN, Senior Circuit Judge. Appellants challenge the district court's decision to dismiss this case under the abstention-like doctrine established in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), which permits federal courts to decline jurisdiction in favor of parallel state litigation for reasons of "wise judicial administration," id. at 818. Appellants claim further error in the court's decision to dismiss one defendant based on lack of personal jurisdiction. We reverse the personal jurisdiction ruling, but conclude that the Colorado River issue must be remanded for further consideration. This is necessary because, insofar as the district court's recorded reasoning reveals its analysis, the court neglected, in exercising its discretion, to give due weight to the heavy

presumption in favor of retaining jurisdiction.

I. Background

This case arises out of a dealership agreement between Hatteras International, a manufacturer of luxury boats, and Villa Marina Yacht Sales, Inc.,[14] Hatteras' longtime exclusive dealer in Puerto Rico and the Caribbean. In September 1988, Hatteras notified Villa Marina by letter that Hatteras was terminating the relationship because of concerns about Villa Marina's business ethics and sales performance.

Through correspondence, Villa Marina strongly objected to the termination and contested the bases for

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[14] Two affiliated companies, Villa Marina Yacht Harbor, Inc., and San Juan Bay Marina, Inc., also were joined as plaintiffs in this case. For the sake of convenience, we shall refer to them collectively as Villa Marina throughout this opinion.

the decision. Nevertheless, in November, Hatteras executed a dealership agreement with Hatteras Yacht Sales of Puerto Rico, Inc. ("Yacht Sales"), naming it Hatteras' new exclusive dealer in Puerto Rico. Yacht Sales is owned by Pedro Rivera Fullana, who left his position as sales manager at Villa Marina to open the new distributorship.

Three different lawsuits followed shortly after these events. On January 9, 1989, Hatteras filed the first action against Villa Marina in Puerto Rico Superior Court. The company sought a declaratory judgment that Commonwealth law permitted termination of the Villa Marina dealership agreement, and injunctive relief barring Villa Marina and its agents from interfering with the sale of Hatteras products by Yacht Sales. On February 7, Villa Marina answered and counterclaimed for damages under the Puerto Rico Dealer's

Act, known as Law 75, P.R. Laws Ann. tit. 10, § 278 (1978), which prohibits a manufacturer from terminating a dealer's contract in the absence of "just cause."

Three days later, Villa Marina and its president, Eduardo Ferrer Bolivar, filed a separate action in the local court against Yacht Sales, Yacht Sales' president (Rivera), and the president of Hatteras International, Herbert Pocklington, alleging tortious interference with the dealership agreement between Hatteras and Villa Marina, and damage to reputation. On May 19, however, Villa Marina moved for dismissal without prejudice of the claims against Pocklington, apparently in preparation for the third lawsuit, which it filed a few days later in federal court against Pocklington, Hatteras Yacht, Hatteras

International and Hatteras' parent corporation, Genmar Industries, Inc.[15] This suit alleges violations of Law 75, breach of contract, tortious interference with prospective business advantage and tortious interference with contracts.

Defendants subsequently moved to dismiss the federal case against Pocklington based on a lack of personal jurisdiction, and later filed a motion to dismiss or stay under the Colorado River doctrine in light of the "substantially similar[]" action pending in the Commonwealth court. The district court granted both motions, and ordered that the case be dismissed. On appeal, Villa Marina argues that the court erroneously

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[15] Hatteras Yacht and Hatteras International are both unincorporated divisions of Genmar Industries. Villa Marina's contract was with Hatteras International, and references to "Hatteras" throughout this opinion generally refer to that company.

found that it lacked personal jurisdiction over Pocklington and failed to apply the appropriated standard in considering whether to dismiss the case under Colorado River. We shall discuss each of these issues in turn.

II. Personal Jurisdiction

Villa Marina alleged in its federal complaint that Herbert Pocklington, president of Hatteras International, deliberately made false statements to Hatteras and another yacht manufacturer for the purpose of, and with the result of, inducing the companies to breach their contracts with Villa Marina. The complaint specifically alleges that Pocklington provided Hatteras with false information concerning Villa Marina's finances, told Hatteras that Villa Marina "had either committed crimes or acted unethically," and made false statements to Bertram-Trojan, Inc. ("Bertram"), the

other yacht manufacturer, about Hatteras' reasons for terminating Villa Marina as its dealer. Pocklington's actions, according to the complaint, constituted tortious interference with contracts and tortious interference with prospective business advantage.

In a sworn statement attached to his motion to dismiss,[16] Pocklington admitted that, as the Hatteras officer in charge of the distribution and marketing of Hatteras products in Puerto Rico, he had executed the dealership agreement between Hatteras and Villa Marina and later signed the letter terminating Villa Marina as a Hatteras dealer. He further acknowledged that he had executed the

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[16] In addition to seeking dismissal based on lack of personal jurisdiction, this motion sought to quash service on the defendants based on improper procedures. The district court concluded that service was made properly, and defendants have not appealed that ruling.

dealership agreement with Yacht Sales, the dealership that replaced Villa Marina as Hatteras' representative in Puerto Rico. Pocklington stated that he traveled to Puerto Rico in his corporate capacity "to discuss and take measures with respect to the distribution and service of Hatteras products in Puerto Rico." He denied, however, that he had committed any tortious acts in Puerto Rico, asserting that he had never acted with malice or bad faith toward Villa Marina, or made any false statements to Hatteras or Bertram about Villa Marina.

The district court held that personal jurisdiction over Pocklington had not been accomplished because Villa Marina failed to rebut Pocklington's sworn statements that he had not made false statements or committed tortious acts in Puerto Rico. The court relied on Escude Cruz v. Ortho Pharmaceutical Corp., 619

F.2d 902, 906, 907 (1st Cir. 1980), in which we held that jurisdiction over a corporate officer may not be based merely on jurisdiction over the corporation but must rest on a "showing of direct personal involvement by the corporate officer in some decision or action which is causally related to plaintiff's injury." Six of the seven individual defendants in Escude Cruz filed unrebutted affidavits denying any involvement with the subsidiary corporation in Puerto Rico for which the plaintiff worked.

The district court erred in two respects in relying on Escude Cruz. First, this is not a case in which a plaintiff seeks to establish jurisdiction over a corporate officer based solely on his corporate status. Pocklington admits that he played a direct role in the "distribution and service of Hatteras products in Puerto Rico," and Villa

Marina's complaint points to specific actions by Pocklington that caused it financial harm.[17] This is in direct contrast to Escude Cruz, where neither the complaint nor the defendants' affidavits showed any link between the defendants -- officers and directors of a New Jersey corporation -- and the Puerto Rico company that employed the plaintiff.[18] Cf.

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[17] We reject defendants' contention that Villa Marina offered only conclusory allegations against Pocklington. The allegations of false statements made to Hatteras and Bertram regarding Villa Marina's finances and business practices are sufficiently specific to be given weight in determining whether Villa Marina has met its burden of showing that jurisdiction exists. See Kowalski v. Doherty, Wallace, Pillsbury & Murphy, 787 F.2d 7, 8 (1st Cir. 1986) (where there has been no evidentiary hearing, plaintiff need only make prima facie showing of jurisdiction). This is particularly true when Villa Marina's allegations of jurisdictional facts are construed, as they must be, in Villa Marina's favor. Id. at 9.

[18] Although one defendant admitted involvement with company operations, the

Alvarado-Morales v. Digital Equipment Corp., 843 F. 2d 613, 617 (1st Cir. 1988) (no personal jurisdiction where parent company and corporate officers had no involvement in decisions of Puerto Rican subsidiary).

Second, the district court erroneously believed that plaintiff's failure to rebut Pocklington's affidavit was equivalent to the failure of the plaintiff in Escude Cruz to counter the affidavits filed by the defendants there. In Escude Cruz, the plaintiff failed to rebut the defendants' assertions that they were uninvolved with the subsidiary company and therefore had no connection with Puerto Rico. In this case, however, Pocklington admitted in his affidavit that he had substantial involvement with

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plaintiff failed to allege any specific participation by him in the conduct that caused plaintiff's harm.

Hatteras' operations in Puerto Rico. Indeed, Pocklington confirmed plaintiff's claim that he played a prominent role in deciding Villa Marina's fate. Moreover, Pocklington did not deny making statements about Villa Marina to Hatteras and Bertram, but denied only that he had made false statements.

Thus, there was no need for Villa Marina to respond to Pocklington's affidavit; personal jurisdiction does not depend upon whether the statements Pocklington made were false and actionable, but only whether Pocklington took some action that, if wrongful (a matter for later proof), could subject him to liability in Puerto Rico. Under Rule 4.7(a) (2) of P.R. Laws Ann. tit. 32, App. III (1984), an individual is subject to suit in Puerto Rico if he "[e]xecutes by himself or through his agent tortious acts within Puerto Rico." Requiring proof of

the tortious nature of acts in order to assert jurisdiction would make the jurisdictional determination identical to the merits. To establish jurisdiction, therefore, Villa Marina needed only to assert facts showing that Pocklington committed sufficient acts within Puerto Rico, the tortious nature of which would be the issue on the merits.

The facts alleged in the complaint, taken together with Pocklington's affidavit, clearly establish sufficient action to meet the requirements of Puerto Rico's long-arm statute. We previously have held that Rule 4.7(a) (2) allows jurisdiction "where a defendant who has availed himself of the laws and benefits of Puerto Rico commits a tortious act within or without the Commonwealth that he knows or reasonably should know will cause injury within Puerto Rico." Mangual v. General Battery Corp., 710 F.2d

15, 19 (1st Cir. 1983). As the corporate officer in charge of distribution and marketing of Hatteras' products in Puerto Rico, Pocklington has initiated and maintained substantial contacts with Puerto Rico individuals and businesses, arranging dealerships that presumably benefit himself and Hatteras International. He has visited Puerto Rico for these business purposes, and has influenced, if not controlled, decisions that directly affected Puerto Rico citizens. Villa Marina alleges that Pocklington played a primary role in causing its harm, and Pocklington's affidavit does not dispute that he made the statements described in Villa Marina's complaint.

The complaint and affidavit therefore establish jurisdiction within the reach of Puerto Rico's long-arm statute, and it is worth noting that the

exercise of jurisdiction in these circumstances falls well within constitutional standards. Pocklington unquestionably "availed himself of the laws and benefits of Puerto Rico and acted in such a manner 'that he could reasonably anticipate being haled into court' in Puerto Rico," Mangual, 710 F.2d at 19-20 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). There is no doubt that the "minimum requirements of 'fair play and substantial justice'" were met here, Dalmau Rodriguez v. Hughes Aircraft Corp., 781 F.2d 9, 15 (1st Cir. 1986) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985); World-Wide Volkswagen, 444 U.S. at 292)).[19]

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[19] Defendants contended at oral argument that personal jurisdiction was not established because Villa Marina failed to allege that Pocklington made false statements in Puerto Rico. Under Mangual, the issue is

We therefore reverse the district court's dismissal of Pocklington for lack of personal jurisdiction.[20]

III. Colorado River Doctrine

A. Legal Principles

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not where a statement was made but whether it was directed toward, and had an effect within, the relevant location. We similarly held with respect to Massachusetts' long-arm statute in Murphy v. Erwin-Wasey, Inc., 460 F.2d 661, 664 (1st Cir. 1972):

> Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the jury of a resident of that state, he has, for jurisdictional purposes, acted within that state.

See also Burger King, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

[20] We, of course, offer no view as to the substance of Villa Marina's claims against Pocklington.

The Supreme Court in Colorado River established a doctrine governing the stay or dismissal of federal lawsuits in circumstances in which the three traditional categories of abstention were inapplicable. See 424 U.S. at 817.[21] This alternative basis for declining jurisdiction rested not on "considerations of state-federal comity or on avoidance of constitutional decisions, as does abstention, but on 'considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."'" Moses H. Cone Memorial

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[21] The three abstention categories discussed by the Supreme Court were: (1) when a federal court can avoid a constitutional determination by allowing a state court to construe state law; (2) when the case involves difficult questions of state law involving significant policy considerations, and (3) when federal jurisdiction has been invoked to restrain state criminal proceedings. 424 U.S. at 814-817.

Hospital v. Mercury Constr. Corp., 460 U.S. 1, 14-15 (1983) (quoting Colorado River, 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952))). In recognizing this form of deference, however, the Court took care to emphasize its narrowness. Because federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," Colorado River, 424 U.S. at 817, the Court held that the surrender of jurisdiction in favor of parallel state proceedings for reasons of "wise judicial administration" is permissible only in "exceptional" circumstances, id. at 818.

Thus, while "the general principle [in an overlap between two federal district courts] is to avoid duplicative litigation," id. at 817, the pendency of an overlapping state court suit is an insufficient basis in and of

itself to warrant dismissal of a federal suit. Because "[o]nly the clearest of justifications will warrant dismissal," id. at 819, the circumstances permitting a district court to dismiss a case under the Colorado River doctrine "are considerably more limited than the circumstances appropriate for abstention," id. at 818.

The Court in Colorado River listed four illustrative factors to be considered in determining whether "exceptional circumstances" exist: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation, and (4) the order in which the forums obtained jurisdiction. In Moses H. Cone, the Court reaffirmed the exceptional circumstances test and added two additional factors: (5) whether state or federal law controls, and (6) the adequacy

of the state forum to protect the parties' rights. Other courts have articulated additional factors, such as the presence or absence of concurrent jurisdiction and the vexatious or contrived nature of the federal claim, see, e.g., Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1288 (7th Cir. 1988) (listing 10 factors). See also Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 309-310 (1st Cir. 1986) (affirming district court dismissal and expressing displeasure at practice of filing federal action in reaction to adverse ruling in state court).

The weight to be given any single factor may vary greatly depending on the case, and "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of

factors counselling against that exercise is required," Colorado River, 424 U.S. at 818-19. To ensure that only exceptional cases are dismissed from federal court, the district court must approach its decision "with the balance heavily weighted in favor of the exercise of jurisdiction," Moses H. Cone, 460 U.S. at 16.

The decision whether to surrender jurisdiction is "necessarily left to the discretion of the district court in the first instance," Moses H. Cone, 460 at 19, and the district court's decision may be reversed only for an abuse of that discretion. "Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under . . . Colorado River's exceptional-circumstances test," id. We therefore must determine whether the district court

abused its discretion in finding that "exceptional circumstances" outweighed the court's "virtually unflagging obligation . . . to exercise the jurisdiction give [it]," Colorado River, 424 U.S. at 817.

B. Application of the Doctrine

The district court in this case correctly articulated the Colorado River "exceptional circumstances" test. The analysis in its opinion, however, indicates that it balanced the relevant factors without giving weight to the heavy presumption favoring the exercise of jurisdiction. See American Bankers Ins. Co. v. First State Ins. Co., 891 F.2d 882, 885 (11th Cir. 1990) (reversing stay because district court failed to give sufficient regard to the presumption); Bethlehem Contracting Co. v. Lehrer/McGovern, Inc., 800 F.2d 325, 327 (2d Cir. 1986) (reversing dismissal because district court gave "no weight" to

presumption). The court found that "good cause" existed for the dismissal of the federal proceedings based on the parties and issues in the local lawsuit, the lack of personal jurisdiction over defendant Pocklington, and "the Colorado River doctrine principles," Opinion at 9. But there is no indication in its decision that the court balanced the factors in favor of dismissal against its obligation to exercise jurisdiction even in the face of duplication and judicial inefficiency. Indeed, the court's use of the term "good cause," rather than "exceptional circumstances," as the basis for dismissal evinces an insufficient regard for that obligation.

We therefore are constrained to conclude that the court dismissed this case simply because, on balance, the Commonwealth court seemed the better place for the issues to be resolved. This

approach seems eminently reasonable at first blush; staying or dismissing a duplicative federal lawsuit may avoid friction between jurisdictions, reduce inefficient use of judicial resources and limit the financial burden on litigants. Such a liberal approach toward dismissal is, however, inconsistent with the Colorado River requirement that the balance be "heavily weighted in favor of the exercise of jurisdiction," Moses H. Cone, 460 U.S. at 16. Duplication and inefficiency are not enough to support a federal court's decision to bow out of a case over which it has jurisdiction. In Moses Cone, 460 U.S. at 25-26, the Court emphasized that "our task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances,

the 'clearest of justifications,' that can suffice under Colorado River to justify the surrender of that jurisdiction" (emphasis in original).

Because the district court did not apply the proper standard, its decision to dismiss Villa Marina's federal suit must be vacated.[22] Although we could ourselves now weigh the factors considered by the district court, see e.g., American Bankers Ins. Co., 891 F.2d at 885-86; Evanston Ins. Co., 844 F.2d at 1191-93; Bethlehem Contracting Co., 800 F.2d at 327-28, we prefer instead to give the district court the opportunity to conduct the proper balancing in the first

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[22] Our conclusion that the district court erred in dismissing Pocklington from the case for lack of personal jurisdiction further supports the decision to remand because the court included "the personal jurisdiction controversies" as one factor influencing its decision to dismiss under Colorado River.

instance. This appears to be a close case, and the district court may be privy to relevant facts that do not appear in the appellate record because that court previously saw no need to relate them. We cannot properly conduct a review for abuse of discretion until after that discretion has been properly exercised, and we therefore remand the case to the district court for reconsideration.

In returning the issue to the trial court, we also choose to offer it some guidance for what we anticipate will be a difficult decision. The Colorado River doctrine does not provide a mechanical formula for determining when dismissal is proper, and similar factors have been given varying importance by different courts. Compare, e.g., Evanston Ins. Co., 844 F.2d at 1192-93 (reversed dismissal, discounting potential for piecemeal litigation and rejecting

relevance of state law issues) with, e.g., General Reinsurance Corp., v. CIBA-Geigy Corp., 853 F.2d 78, 81-82 (2d Cir. 1988) (affirming dismissal, highlighting potential for piecemeal litigation and giving weight to presence of "purely state law issues"). We therefore think it worth giving some attention to our view of the significance of certain factors argued by the parties in this case.

We begin by noting that, despite Villa Marina's effort to focus our attention solely on the Commonwealth suit filed by Hatteras, the question for the district court is whether it should defer to the consolidated action containing both Hatteras' declaratory judgment suit and Villa Marina's separately filed suit against Rivers and Yacht Sales. Indeed, Villa Marina's decision to file its own suit in the Commonwealth court before initiating its federal action arguably is

the primary factor in this case counseling in favor of a surrender of federal jurisdiction.

Other courts faced with second lawsuits brought by the same plaintiff have considered that factor relevant in upholding district court decisions to dismiss the federal case. See, e.g., American Int'l Underwriters v. Continental Ins. Co., 843 F.2d 1253, 1260-61 (9th Cir. 1988); LaDuke v. Burlington Northern R.R. Co., 879 F.2d 1556, 1561 (7th Cir. 1989); Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1289 (7th Cir. 1988); Telesco v. Telesco Fuel and Masons, 765 F.2d 356, 363 (2d Cir. 1985).

In American Int'l Underwriters, the Ninth Circuit invoked removal principles in support of its conclusion that plaintiffs should not be allowed to refile their complaint in federal court. The court observed that the right to

remove a state court case to federal court is limited to defendants under 28 U.S.C. § 1441, and it stated that removal principles seemed applicable in the context of a repetitive lawsuit because the dual filing "had the same effect as if [the plaintiff] had actually removed the original suit," 843 F.2d at 1260. The Ninth Circuit relied on Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941), in which the Supreme Court analyzed the removal statute, and quoted from a House Report stating that "'it is believed to be just and proper to require the plaintiff to abide his selection of a forum,'" id. at 106 (quoting H.R. No. 1078, 49th Cong., 1st Sess. 1 (1887)). The circuit panel drew the following conclusion from its research:

> In short, . . . the removal statute seem[s] to reflect a Congressional intent that a plaintiff should not be permitted to alter the forum that it

> selects to litigate its claim against a particular defendant.

Id. at 1261. See also Note, "Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River," 44 U. Chi. L. Rev. 641, 666-667 (1977) (hereinafter "Federal Court Stays") (removal statute arguably expresses a policy determination limiting plaintiff to initial forum, "counterbalanc[ing] the obligation to exercise jurisdiction in the subsequent repetitive federal lawsuit.")

Assuming that removal policy should be given some force in the Colorado River context, it would not necessarily lead to dismissal of Villa Marina's federal lawsuit. The district court still must determine how much weight the policy should carry in this particular case. Villa Marina's federal lawsuit does not duplicate the claims that it filed in Commonwealth court, and the defendants in each suit also are different.

Villa Marina arguably dismissed Pocklington from the Commonwealth lawsuit precisely to avoid unnecessary duplication. Thus, while Villa Marina's role as a plaintiff in the Commonwealth suit may be a significant factor in the Colorado River balance, it is certainly not determinative.

A related factor that could tip the balance toward dismissal is the motivation for the second lawsuit. In Moses H. Cone, the Supreme Court stated that if found "considerable merit" in the idea that "the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under Colorado River," 460 U.S. at 17 n.20. Before Villa Marina filed the federal suit, the Commonwealth court had rejected its bid for a preliminary injunction barring Yacht Sales from representing Hatteras in Puerto Rico. Thus, if Villa Marina went to federal court solely in reaction to its

failure in the Commonwealth court, the fact should be held against it in the Colorado River balance. We previously have criticized such forum-shopping when a Commonwealth defendant "rush[ed] over to the federal courthouse in the hope of obtaining a more favorable determination," Fuller Co., 782 F.2d at 309-310. The sentiment applies a fortiori with respect to a Commonwealth plaintiff. See Telesco, 765 F.2d at 363 (affirming dismissal of federal suit filed by state court plaintiff that appeared both vexatious and reactive).[23]

The "inconvenience" factor, as that terms has been used by the Supreme Court, does not point toward abstention in this case. In raising this factor, the Court seemed to be concerned with the physical proximity of the

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[23] We offer no view here as to whether Villa Marina's federal suit was, in fact, reactive or vexatious. The district court is better able to make such a determination in light of its more substantial contact with the parties.

federal forum to the evidence and witnesses. See Colorado River, 424 U.S. at 818, 820. Accord Evanston Ins. Co., 844 F.2d at 1191. In this case, however, the state and federal fora are in the same city.

Two other factors that could prove significant are the relative progress of the two cases and the difficulty of the substantive state law questions. Hatteras argues that the Commonwealth proceeding is substantially more developed than is the federal action, noting that the Commonwealth court held a three-day preliminary injunction hearing and that numerous depositions have been taken in that case. It is unclear to us, however, whether the depositions and hearing represent progress that should count in the balance toward dismissal. Villa Marina plausibly asserts that the depositions could be utilized in either litigation, and a three-day hearing for the limited purpose of deciding on preliminary injunctive relief may

not have advanced the state case in any appreciable way. Cf. Nakash v. Marciano, 882 F.2d 1411, 1412-13 (9th Cir. 1989) (federal suit filed almost four years after state suit, after 70 hearings, nearly 100 depositions, 300,000 documents); Interstate Material Corp., 847 F.2d at 1289 (by the time federal court heard motion to dismiss, state action had reached appellate court).

Both the federal and Commonwealth cases involve only Commonwealth law, but this factor does not necessarily counsel in favor of dismissal. Although the presence of a federal law issue "must always be a major consideration weighing against surrender [of jurisdiction]," Moses H. Cone, 460 U.S. at 26, the presence of state law issues weighs in favor of surrender only in "rare circumstances," id. See American Bankers Ins. Co., 891 F.2d at 886; Evanston Ins. Co., 844 F.2d at 1193; Bethlehem Contracting Co., 800 F.2d at 328. Courts generally have agreed

that rare circumstances exist only when a case presents "complete questions of state law that would best be resolved by a state court," American Bankers Ins. Co., 891 F.2d at 886; Noonan South, Inc. v. Volusia County, 841 F.2d 380, 382 (11th Cir. 1988). See also Arkwright-Boston Mfrs. Mutual v. City of New York, 762 F.2d 205, 211 (2d Cir. 1985) (case raises "serious questions of state law, which include whether a party may recover in tort for a purely economic loss, absent physical injury . . . and the construction of state and municipal building, safety, and fire codes"). Cf. Giardina v. Fontana, 733 F.2d 1047, 1051 (2d Cir. 1984) ("garden variety" federal diversity case applying well-settled state law principles).

It is possible that "rare circumstances" weighing in favor of dismissal exist here. The law at the foundation of this case is the Puerto Rico Dealer's Act, Law 75, which prevents manufacturers from terminating

dealer contracts in the absence of just cause. Although federal courts have interpreted Law 75 on numerous occasions, see, e.g., Luis Rosario, Inc. v. Amana Refrigeration, Inc., 733 F.2d 172 (1st Cir. 1984); Sudouest Import Sales Corp. v. Union Carbide Corp., 732 F.2d 14 (1st Cir. 1984); Pan American Computer Corp. v. Data General Corp., 652 F.2d 215 (1st Cir. 1981); Morales v. Gregg Shirt Makers, 682 F. Supp. 142 (D.P.R. 1988), we also have recognized the need to consult with the Commonwealth courts about certain aspects of the statute. See Medina & Medina v. County Pride Foods, Ltd., 825 F.2d 1 (1st Cir. 1987) (certification to Puerto Rico Supreme Court). The district court therefore should consider whether the specific Law 75 issues in this case, or other issues of Commonwealth law, are sufficiently novel that this factor weights in favor of dismissal.

Finally, we offer some observations regarding the concern for

avoiding piecemeal litigation. Dismissal is not warranted simply because related issues otherwise would be decided by different courts, or even because two courts otherwise would be deciding the same issues. As noted above, something more than a concern for judicial efficiency must animate a federal court's decision to give up jurisdiction. See American Bankers Ins. Co., 891 F.2d at 886 ("A federal court cannot properly decline to exercise its statutory jurisdiction . . . simply because judicial economy might be served by deferring to a state court.") In Colorado River, the Supreme Court relied upon a federal statute, the McCarran Amendment, whose "primary policy" was avoidance of piecemeal litigation regarding water rights. Moses H. Cone, 460 U.S. at 19-20 & n.22. No such policy is at stake here. Nor is there the risk of results as harsh as those that concerned us in Liberty Mutual Ins. Co. v. Foremost-McKesson, Inc., 751 F.2d 475, 477

(1st Cir. 1985), where the possibility existed for the state and federal courts to interpret the same standard insurance policy language differently, "with the result that McKesson would find itself without sufficient liability insurance coverage form the insurers after years of paying premiums."[24]

Thus, in considering whether the concern for avoiding piecemeal litigation should play a role in this case, the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring

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[24] It is important to recognize that the federal suit in Liberty Mutual was a declaratory judgment action, a context in which "a federal court's duty to exercise its jurisdiction is relaxed," Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 308-309 n.3 (1st Cir. 1986). Thus, courts may dismiss federal declaratory judgment actions on grounds that are less than exceptional. Id.

the case to proceed entirely in the Commonwealth court.

We emphasize that our discussion of the Colorado River issue does not necessarily cover all factors that may be relevant and certainly does not analyze all those that we have addressed. The district court therefore should not deem itself in any way limited by our discussion when it reconsiders the propriety of dismissing the federal case in light of the presumption in favor of retaining jurisdiction.

Reversed in part, vacated in part and remanded. Appellants shall receive half of their costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VILLA MARINA YACHT SALES, INC., VILLA MARINA YACHT HARBOUR, INC. and SAN JUAN BAY MARINA, INC.	
Plaintiffs	Civil No.89-0709GG
v.	
HATTERAS YACHTS, HATTERAS INTERNATIONAL, DIVISIONS OF GENMAR INDUSTRIES, INC., GENMAR INDUSTRIES, INC., and HERBERT L. POCKLINGTON	
Defendants	

OPINION AND ORDER

On May 23, 1989 plaintiffs Villa Marina Yacht Sales, Inc., Villa Marina Yacht Harbour, Inc. (Villa Marina), and San Juan Bay Marina, Inc. filed a complaint alleging breach of dealership contract, and tortious interference with contracts and prospective business. Jurisdiction is invoked pursuant to 28 U.S.C. §1332. Defendants Genmar

Industries, Inc. (Genmar), Herbert Pocklington (Pocklington), Hatteras International (Hatteras Intl.) and Hatteras Yachts filed a motion to quash service and dismiss the complaint. Pending before us are defendants' motion to quash service and dismiss, and their motion or stay under the Colorado River doctrine.

MOTION TO QUASH SERVICE AND DISMISS

On three separate occasions, plaintiffs requested an order for the appointment of a person for service of process; the magistrate granted these motions. On August 8, 1989 defendants filed a motion to quash service of process and to dismiss the complaint for lack of personal jurisdiction. Defendants argue that since they are not domiciled in Puerto Rico, process can only be served under Rule 4.7 of the Puerto Rico rules of Civil Procedure (PRRCP).

Jurisdiction is based on diversity of citizenship in the instant action. Rule 4(e) of the Federal Rules of Civil Procedure (FRCP) provides the procedure for service of process upon a party not domiciled in the state.

> . . .service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides 1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of our found within the state, . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Since our district court rules do not provide for extraterritorial service, it should be effected in the manner prescribed by the state rules. Rule 4 of the PRRCP describes how service of process

may be made; its sections should be interpreted in consonance with each other. 32 P.R. Laws Ann., App. III, R. 4 (1979). Rule 4.3(a) of the PRRCP states that in the case of defendants who are not in Puerto Rico, service shall be effected by a marshal of the jurisdiction where it is made, by an attorney authorized to practice law in said jurisdiction or in Puerto Rico, or by a person specially appointed by the court for that purpose.

Service on a person not domiciled in Puerto Rico who has 1) transacted business in Puerto Rico personally or through an agent, 2) participated in tortious acts within Puerto Rico, 3) been involved in an accident in Puerto Rico, or 4) owns real property in Puerto Rico, shall be made pursuant to Rule 4.5 of the PRRCP, as provided by Rule 4.7(a) and (b) of the PRRCP, in order for the court to assert jurisdiction. Rule 4.5 of the PRRCP

provides for service by publication when process is to be served on a person outside Puerto Rico. The last paragraph of this rule reads as follows:

> In the case of defendants who are outside Puerto Rico, plaintiffs may substitute personal delivery of the complaint and the summons upon the defendants for service by publication. Service of process in this case shall be made pursuant to Rule 4.3

As explained earlier, service of process on a person outside Puerto Rico shall be effected by a marshall, an attorney or an authorized person appointed by the court for that purpose. That is, if plaintiffs choose the personal service of process option provided by Rule 4.5 of the PRRCP. Rule 4.4 of the PRRCP regulates personal service. Upon a person of legal age, service shall be effected by the delivery of a copy of the summons and the complaint personally or to an agent; upon a corporation or any other artificial

entity, by delivering a copy of the summons and the complaint to an officer or authorized agent. Rule 4.4(a), (e).

In the instant action, extraterritorial service was made in the manner prescribed by Rule 4 of the PRRCP. Plaintiffs sought the appointment of a person to serve process outside of Puerto Rico, as provided by Rule 4.3(a) of the PRRCP. In order for this court to have jurisdiction over the parties not domiciled in Puerto Rico, Rule 4.7 of the PRRCP had to be complied with. One of the bases of jurisdiction mentioned in Rule 4.7(a) of the PRRCP is the participation in tortious acts, which is alleged in the complaint. Rule 4.7(b) of the PRRCP states that when jurisdiction arises because defendant was involved in one of the acts mentioned in Rule 4.7(a), service shall be made pursuant to Rule 4.5 of the PRRCP. Plaintiffs chose the personal

service option provided by the last paragraph of this rule. Personal service of process guarantees a defendant's right to be heard, and thus has generally been preferred over service by publication. Hach Co. v. Pure Water Systems, Inc., 114 D.P.R. 58, 61 (1983) (citing Mundo v. Fuster, 87 D.P.R. 363 (1963)). Service of process was made personally in compliance with Rule 4.4 of the PRRCP. Defendant Pocklington, in his capacity as President of Hatteras Intl., was personally served with copies of the summons and complaint pursuant to Rule 4.4(a) of the PRRCP.

Defendants move to quash both service of process effected on Hatteras Intl., Genmar, and Pocklington. Defendant Pocklington has filed an affidavit stating that he is Hatteras International's President. He is in charge of distributing and marketing Hatteras products, and of entering into dealership

agreements. Therefore, we find that, pursuant to Rule 4 of the PRRCP, Hatteras Intl. was properly served when a copy of the summons and complaint were personally served upon its president, defendant Pocklington.

The general rule regarding jurisdiction over individual officers of a corporation is that it may not be based merely on jurisdiction over the corporation. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 906 (1st Cir. 1980). An independent basis for asserting jurisdiction over the corporation's officers is required. Id. Jurisdiction was not attained over officers who worked and resided in Pennsylvania, and whose trips to Puerto Rico and other dealings as corporate agents were not related to plaintiff's injury in Mangual v. General Battery Corp., 710 F.2d 15 (1st Cir. 1983).

Without causal nexus between the officers' transactions in Puerto Rico and plaintiff's claims, defendants cannot be found to have carried out business transactions within the meaning of Rule 4.7 of the PRRCP, Puerto Rico's long-arm statute. Id. (citing Arthur Thomas Co. v. Superior Court of Puerto Rico, 98 P.R.R. 864, 870 (1970)). A showing of direct personal involvement by the officer in a decision causally related to plaintiff's injury must be made. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d at 907; see also Alvarado Morales v. Digital Equipment Corp., 669 F. Supp. 1173, 1179-80 (D.P.R. 1987), aff'd, 843 F.2d 819 (1st Cir. 1988). Plaintiffs bringing an action against nonresident defendants have the burden of proving those facts necessary to sustain jurisdiction. Diaz v. Becton Dickinson & Co., 618 F. Supp. 539 (D.P.R. 1985). They must make a prima facie case

showing that Pocklington committed tortious acts in Puerto Rico. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d at 906. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act or omission which operated to the injury or prejudice of the plaintiff is necessary to generate individual liability. Id. (citing Lobato v. Pay-Less Drug Stores, 261 F.2d 406, 408-9 (10th Cir. 1958)).

Plaintiffs allege in their complaint that defendant Pocklington is liable for tortious interference with contracts (count III) and tortious interference with prospective business advantage (count IV). In the affidavit filed by Pocklington, he states that, as President of Hatteras International, he is in charge of distributing and marketing Hatteras products through dealers. While Pocklington says he has travelled to

Puerto Rico in his corporate capacity, he claims he has not committed any tortious acts within Puerto Rico, nor has he made false statements or tortiously interfered with any contract to which Villa Marina is a party.

On August 18, 1989 plaintiffs filed a motion in opposition to defendants' motion to quash service and dismiss for lack of personal jurisdiction. They did not rebut Pocklington's statements, but argue that mere allegations are sufficient to confer in personam jurisdiction. We disagree. Since plaintiffs failed to counter the affidavit, the jurisdictional facts stated in it are controlling. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d at 907 (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1935)).

> The authority which the statute vests in the court to enforce the limitations of its

> jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. Id.

Plaintiffs' reliance on the complaint's allegations is not sufficient to counter defendants' challenge. Thus, we find that jurisdiction over defendant Pocklington has not been properly asserted.

MOTION TO DISMISS OR STAY UNDER COLORADO RIVER DOCTRINE

On November 30, 1989 defendants filed a motion requesting dismissal or stay under the Colorado River doctrine. In essence, the Colorado River doctrine permits federal courts to stay or dismiss an action when judicial efficiency, concerns of comity, and comprehensive

disposition of litigation warrant deference to ongoing proceedings in local court with concurrent jurisdiction. Ramirez v. Skeete, 671 F. Supp. 892 (D.P.R. 1987); see also Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). A federal court with undisputable jurisdiction -- in the instant action, as discussed earlier, personal jurisdiction as to some of the defendants has not been properly asserted -- may refuse to exercise it if exceptional circumstances weighing in favor of a state court resolution are present. Id. Federal courts must balance their obligation to exercise jurisdiction and the factors that advise against the adjudication of the action in their forum. Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

The proceedings before the local court as follows: 1) On January 9, 1989

Hatteras Intl., a division of Genmar, filed an action against Villa Marina Harbour and Villa Marina Yacht (Villa Marina) requesting to rescind the distribution contract between them; 2) On February 8, 1989 Villa Marina answered and counterclaimed under Act 75 of June 24, 1964, 10 P.R. Laws Ann. @ 2787 et seq., and Article 1802 of the Civil Code of Puerto Rico, 31 P.R. Laws Ann. @ 5141, requesting damages for wrongful termination of their distribution contract; 3) On February 10, 1989 Villa Marina and its President Eduardo Ferrer (Ferrer) filed a separate action in the local court against Pocklington, Hatteras Yacht (the current Hatteras distributor in Puerto Rico), and Pedro Rivera Fullana (Rivera), President of Hatteras Yacht, for tortious interference with the distribution contract between Hatteras Intl. and Villa Marina; 4) On March 29,

1989 Hatteras requested the joinder of the local actions; 5) On May 19, 1989 Villa Marina moved for the dismissal without prejudice of the claims against Pocklington. A couple of days later, on May 22, 1989, Villa Marina filed the complaint in the instant action alleging distribution contract violations against defendants Hatteras Intl., Hatteras Yacht, Genmar and Pocklington.

Plaintiffs have filed an opposition to defendants' motion alleging, among other things, that the proceedings before the local court do not deal with the tortious conduct of Hatteras Intl. and Pocklington, who is not a party to the local action. Plaintiffs argue this after they themselves chose to dismiss the claims against this defendant in the state court action. Plaintiffs claim that the federal case is truly comprehensive, yet Ferrer, Rivera and Hatteras Yacht are not

parties to the instant action. While not indispensable, they could be convenient in order to elucidate the Act 75 and Article 1802 issues. They are parties to the local action.

In the interest of judicial efficiency, avoidance of multiplicity of suits, delay and unnecessary expense, we find good cause for the dismissal of the proceedings in this court. After taking into account the parties involved in the local court litigation, the issues in dispute, the personal jurisdiction controversies addressed earlier, and the Colorado River doctrine principles, we find that this matter does not warrant further attention by this court. The parties can obtain satisfactory resolution of their controversies in the local court. See General Office Products Corp. v. A.M. Capen's Sons, Inc., 115 D.P.R. 553 (1984).

Wherefore, in view of the above, defendants' motion requesting dismissal of the instant action under the Colorado River doctrine is hereby GRANTED. The clerk shall enter judgment accordingly.

SO ORDERED.

San Juan, Puerto Rico, this 30th day of January, 1990.

GILBERTO GIERBOLINI

U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1411

VILLA MARINA YACHT SALES, INC., ET AL.,
Plaintiffs, Appellants,
v.
HATTERAS YACHTS, ET AL.,
Defendants, Appellees.

BEFORE
Breyer, Chief Judge,
Campbell, Selya, and Cyr, Circuit Judges,
Coffin and Timbers,* Senior Circuit Judges.**

ORDER OF COURT
Entered: December 2, 1991

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that a petition for rehearing and a suggestion for a rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

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* Of the Second Circuit, sitting by designation.
** Judge Torruella recused himself.
[cc:Messrs. Rovell, Barrios-Amy]